No. 91-877

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ERNST & YOUNG,
Petitioner,
v.
BOB REVES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

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1. The Class does not dispute the critical fact underlying Arthur Young's Section 10(b) legal argument—the Class has never even alleged, much less introduced evidence at trial, that any Class member heard or saw anything that Arthur Young said or did concerning the Co-op prior to purchasing the Co-op's demand notes. As Arthur Young argued in its petition, to presume reliance on omissions that occurred in statements and documents that the Class does not claim to have listened to, read, or relied on is wholly illogical and would effectively eliminate the reliance requirement in Section 10(b) actions.

Because of the undisputed absence of any indication that Class members could have relied on Arthur Young in making their investment decisions, the lower courts should have rejected the Class' Section 10(b) claims as a matter of law. The lower courts, however, interpreted

Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972), as entitling the Class to a presumption of reliance, even though there was no reason to believe that Class members had in fact relied. This Court should grant Arthur Young's petition in order to affirm that *Affiliated Ute* was not intended to provide the means for such a wholesale circumvention of the reliance requirement in Section 10(b) actions.[1]

a. The Class attempts to divert the Court's attention from Arthur Young's dispositive legal argument by asserting that Arthur Young could have attempted to rebut the presumption of reliance as to each of the more than 1600 Class members at trial. The Court should not be fooled, however, into believing that Arthur Young could have rebutted the presumption by adducing evidence that Class members had not seen Arthur Young's audit reports or heard its oral presentations. The lower courts were well aware that the audit reports were never distributed to the Class members and that only a few hundred persons, not one of which was ever shown to be a member of the Class, attended each of the annual meetings. *See, e.g.*, Pet. App. 16a. Instead, as the Class notes (Opp. Br. 19-20), the relevant issue under the lower courts' interpretation of *Affiliated Ute* was whether the Class members still would have purchased the notes "had they known" of the omitted facts.

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[1] The Class continues to overstate Arthur Young's involvement with the Co-op's activities in its Statement of the Case, which is noteworthy for its lack of any citations to the record. For example, while the Class states that Arthur Young "reviewed and approved" the condensed financial statements prior to the Co-op's 1982 Annual Meeting (Opp. Br. 6), the Eighth Circuit more accurately noted that Arthur Young's representative "received the two condensed financial statements when he arrived at the meeting. He had no advance preparation as to the statement's contents." Pet. App. 16a-17a. Most importantly, however, the Class does not dispute the only fact that is relevant to Arthur Young's legal argument—there is no evidence to suggest that the Class actually relied on Arthur Young in any manner.

Consequently, this "presumption" of reliance is in fact virtually irrebuttable and bears no relation to proof of actual reliance. Plaintiffs in most, if not all, Section 10(b) actions will testify that "had the defendant told them before they purchased what they know now, they never would have invested." Such self-serving, after-the-fact testimony does not, however, provide a nexus between defendant's conduct and plaintiff's investment decision that is even remotely equivalent to actual reliance. The Class' assertion that such testimony should satisfy the reliance requirement in Section 10(b) actions merely serves to highlight Arthur Young's principal contention—the Eighth Circuit's interpretation of *Affiliated Ute* is nothing more than a *de facto* elimination of the reliance requirement and should be rejected by this Court.[2]

b. Contrary to the Class' assertion (Opp. Br. 23), Arthur Young is not attempting to read limitations into this Court's holding in *Affiliated Ute*. Instead, Arthur Young's interpretation of *Affiliated Ute* is based on the entire opinion and not just on one paragraph taken out of context. The opinion finds both that plaintiffs had "relied upon [defendants] when they desired to sell their shares," 406 U.S. at 152, and that "positive proof of reliance is not a prerequisite to recovery." *Id.* at 153. Consequently, either the Court was confused regarding whether reliance was present or it was referring to two different aspects of reliance.

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[2] The Class attempts to explain away a commentator's assertion that the courts "no longer require the element of reliance in 10b-5 concealment cases," 5A A. Jacobs, *Litigation and Practice Under Rule 10b-5*, § 62 at 3-254 (2d ed. 1991 rev.), by arguing that the commentator really meant that "subjective reliance" has been replaced by "constructive reliance." Opp. Br. 21 n.5. A more likely explanation is that the commentator was merely using "constructive reliance" as a euphemism for "no reliance."

Arthur Young submits that the Court was not confused.[3] Rather, because the plaintiffs in *Affiliated Ute* had relied on the conduct of the defendants through their face-to-face dealings, the Court held that positive proof of reliance on the defendants' omissions of particular facts was unnecessary. In sum, there must be some communication between plaintiff and defendant, whether written, oral, or otherwise, on which the plaintiff relied before it is logical to presume that the plaintiff relied on the defendant's omission of a particular fact. Such a link between the Class and Arthur Young is entirely missing in this case.

c. The Class unsuccessfully attempts to distinguish the Seventh Circuit's decision in *Latigo Ventures v. Laventhol & Horwath*, 876 F.2d 1322 (7th Cir. 1989). *Latigo* did, as the Class contends (Opp. Br. 27), deal with aiding and abetting liability of accounting firms, but it also dealt with primary liability. In its discussion of primary liability, the court held that plaintiffs who could not allege that they had read an audit report were not entitled to an *Affiliated Ute* presumption of reliance on omissions that the report was alleged to contain. After citing *Affiliated Ute*, the court noted that "[a]lthough the plaintiffs in this case allege both misrepresentations and deceptive omissions by [the accounting firm], they do not allege that these misleading and deceptive omissions misled or deceived *them*." 876 F.2d at 1326. The Court should affirm this straightforward interpretation of *Affiliated Ute* and reject the contrary interpretations that have been adopted in the Second, Eighth, Ninth, and Tenth Circuits. *See* Petition at 18-19.

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[3] Arthur Young's view that some actual reliance was an important element of *Affiliated Ute* is supported by this Court's discussion of the case in *Chiarella v. United States*, 445 U.S. 222, 230 (1980) (explicitly noting that "the Indian sellers had relied upon [the bank's] personnel when they sold their stock").

2. Contrary to the Class' assertion, Arthur Young is not asking this Court to review the Eighth Circuit's interpretation of the Arkansas Securities Act. Ark. Stat. Ann. § 23-42-106(c). The Arkansas Securities Act could not be any clearer in defining the scope of liability for materially aiding in a sale that violates the Act. Such liability is imposed only on three categories of persons—broker-dealers, selling agents, and employees of the seller. Moreover, the crystal clear statutory language was emphasized by the Arkansas Supreme Court in *Hogg v. Jerry*, 773 S.W.2d 84, 89 (Ark. 1989) ("appellees argue that [defendant] materially aided in the sale of each investment, yet [defendant] meets neither the statutory definition of an employee, an agent, or a broker-dealer"). There is simply no room for interpretation on this point.

Consequently, Arthur Young is not asking this Court to interpret the Arkansas Securities Act, but to review the Eighth Circuit's decision to adopt a theory of liability on appeal that was necessarily based on facts that were not litigated during a four-week trial. Notably, even the Class cannot identify which of the three statutory categories is applicable to Arthur Young. Indeed, with respect to the issue of whether Arthur Young was an employee of the Co-op—the only conceivable category in which Arthur Young could fall—the Class states that the Eighth Circuit's opinion "is bereft of any [*sic*] even an implied decision to that effect." Opp. Br. 33.

The real issue, therefore, is fundamental fairness. Arthur Young has never even been told, much less had an opportunity to litigate, which of the three statutory categories it falls within. Yet the Eighth Circuit held that Arthur Young was liable under the Arkansas Securities Act for a multi-million dollar judgment.[4] It is this most

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[4] While Arthur Young believes that the Court should grant review of both issues presented in its petition, granting review only of the Section 10(b) issue could, contrary to the Class' assertion (Opp. Br.

unusual, yet extremely unfair, situation that calls for exercise of the Court's supervisory powers.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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14), reduce Arthur Young's total liability to the Class. *See* Pet. App. 68a ("the larger net recovery was under the federal securities claim").